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In the Supreme Court of the United States

OCTOBER TERM, 1975

EDWARD HENRY ASHDOWN AND
CHARLES E. GRAHAM, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Western District of Texas, petitioners were jointly convicted on ten counts of an eleven-count indictment charging securities fraud (counts 1-4, 6-8) and mail fraud (counts 9-11). Petitioner Graham was sentenced to ten years' imprisonment; petitioner Ashdown was sentenced to seven years' imprisonment.[1] The court of appeals affirmed (Pet. App. A; 509 F.2d 793).

In July 1967, petitioner Graham, the general managing partner of Graham Oil Company, obtained controlling interest in Mountain States Development Company,

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[1]Each petitioner was sentenced to five years' imprisonment on count 1. On counts 2-4 and 6-8, Graham was sentenced to five years' imprisonment and Ashdown to two years' imprisonment, the terms to run concurrently with each other but consecutively to the sentences imposed on count 1. On counts 9-11, petitioners were sentenced to prison terms of five and two years respectively, to run concurrently with each other and with the sentences imposed on the other counts.

whose shares were then listed on the Salt Lake Stock Exchange, selling at a price of six or seven cents per share (Tr. 85-86). Under the agreement with Graham Oil, Mountain States was required to purchase certain of Graham Oil's properties, which were otherwise encumbered. The Mountain States shareholders were subjected to a ten cents per share assessment for the purpose of raising funds to purchase the Graham Oil properties; however, the existence of the prior liens and assignments on the properties was not disclosed to the shareholders. The assessment enabled Mountain States to raise $290,000, of which $115,000 was given to petitioner Graham (Tr. 650). Of this amount only $5,500 was applied to the debts owed on the Graham Oil properties (Tr. 650-654).

Thereafter, Graham, representing Mountain States, made two acquisitions: Laser Power Industries, a small battery company incorporated in Nevada, and a productive oil property in California known as the Jones lease. On May 14, 1968, Graham sold the Jones lease and the assets of Laser Power to the city of Deming, New Mexico, in exchange for revenue bonds in the face amount of $1,080,000, and a lease-back of the battery company's assets to a newly formed subsidiary, Laser Power Industries of New Mexico (Tr. 220-227; Gov't Exs. 41, 42). The agreement contemplated construction of a battery plant in Deming; otherwise, the revenue bonds would be valueless, since Deming's obligation on the bonds was limited to the revenue derived from lease payments made by the operating company (Tr. 227-229). The shareholders of Mountain States were made aware of the transaction with Deming but not of the limited obligation of the city on the bonds.

Petitioner Ashdown became associated with Mountain States in the fall of 1967 as the manager of its Los Angeles office. His primary responsibilities were to promote Mountain States and to seek out prospective acquisitions (Tr. 845, 851). On the day after the deal between Mountain States and Deming was closed, Ashdown and Graham, on behalf of Mountain States, transferred a controlling interest in Laser Power of New Mexico to a small California corporation, Manhattan West, in exchange for receiving the proceeds of a proposed underwriting of stock of a Canadian firm controlled by Manhattan West. This transaction was not disclosed to the Mountain States shareholders either in a shareholder letter mailed on May 28, 1968, or in the annual report distributed in late July (Tr. 704). Instead, the annual report continued to describe Laser Power and the Jones lease as assets of Mountain States.

In July 1968, Mountain States obtained certain mining claims in Honduras. Petitioners then traveled to New York City to engage a financial public relations specialist to prepare a press release concerning this acquisition. The release, issued on August 8 to 250 stockbrokers, reported that Mountain States had acquired claims independently assayed to contain $25 million in recoverable gold and silver. When the Securities and Exchange Commission thereafter required data to support this release, Graham furnished engineering reports that related to an entirely different river basin in Honduras, made no reference to silver, and did not justify the estimate of $25 million (Tr. 68, 671-672).

During this period, both petitioners publicized Mountain States, and the market value of a share in the corporation rose to more than two dollars (Tr. 245). Investors, paying constantly increasing prices for Mountain States shares, relied upon information furnished by petitioners personally, or contained in shareholders' letters and the annual

report. Trading was ordered suspended by the SEC on August 28, 1969 (Tr. 400).

Prior to the suspension, both petitioners had traded actively in the shares of Mountain States. Ashdown's sales aggregated $172,170, of which the greater part was realized after the issuance of the press release concerning the false claims in Honduras (Gov't Ex. 106). Graham's selling was done largely through nominee accounts by a Salt Lake City broker. Of $266,250 in sales made at Graham's direction, the broker remitted $153,650 directly to Graham or his agents after the issuance of the annual report in late July (Tr. 428-493). On the day before trading in Mountain States was suspended, Ashdown submitted an order to a Los Angeles broker to sell a number of his shares. The order was not received in time to be executed that day, and could not be executed at all thereafter because of the suspension. Ashdown contacted his broker and expressed his disturbance at having lost money because of the failure to execute the sale (Tr. 400-401). .

1. The petition contains no analysis of its bare claim (Pet., par. 8d, p. 2) that the evidence was insufficient to support Ashdown's conviction. The court of appeals correctly concluded (Pet. App., pp. 3-4) that there was ample evidence to show Ashdown's participation in the scheme to defraud investors in Mountain States securities and his own telephoning and mailing of information to potential investors in support of that scheme. Although Ashdown was aware of the deficiencies in the Mountain States publications, he continually spoke of the company enthusiastically to prospective investors while personally selling large quantities of the shares. The evidence amply demonstrated that Ashdown promoted the venture and made it his own. See *Pereira* v. *United States*, 347 U.S. 1, 12-13.

2. Counts 1-4 of the indictment, charging violations of 15 U.S.C. 77q, alleged as the interstate element the placing in the mail on July 26, 1968, of the 1967 annual report addressed from the El Paso, Texas, office of Mountain States to its Los Angeles office. Each count then set forth the name of an investor who thereafter had been defrauded by the mailing. Petitioners contend that each count charges the same crime, because the evidence showed that the annual reports were mailed in bulk, necessitating just one use of the mails. In view of petitioners' sentences, however, there is no need to consider this contention. See *Barnes* v. *United States*, 412 U.S. 837, 848, n.16.[2]

In any event, each count involved a separate victim of petitioners' fraud. See *United States* v. *Amick*, 439 F.2d 351, 359 (C.A. 7), certiorari denied *sub nom. Broderick* v. *United States*, 404 U.S. 823. More than one act of securities fraud was committed by the bulk mailing of numerous copies of an annual report intended for distribution to potential investors who would rely upon the misleading information contained therein to create a demand for shares of Mountain States at increasing prices.

3. Petitioners contend that the prosecutor's closing argument contained improper remarks. Petitioners made no objection at trial to the characterizations that they now assail. In any event, the prosecutor's descriptions of petitioners as swindlers and thieves, and his reference to the annual report as containing lies, are nothing more than fair comment upon the evidence or deserved responses

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[2]The sentences on counts 2-4, though concurrent with each other, run consecutively to the sentences on count 1. The sentences on counts 6-8, however, are identical to and run concurrently with those on counts 2-4. As a practical matter, therefore, the sentences on counts 2-4 can be ignored. Petitioners allege no collateral adverse consequences that will flow from the concurrent sentences on counts 2-4.

to defense counsel's attempts to portray their clients as acting in good faith under advice of counsel.[3]

4. Petitioners' claim of newly discovered evidence, in the form of a recent determination by the Internal Revenue Service that Graham's income for 1968 was only $45,691, was not presented to the court of appeals and should not be reviewed for the first time in this Court. This new information has no practical effect upon the incriminating evidence adduced at trial. It certainly would have had no effect upon the jury's conclusion that petitioners committed acts of deceit.

In any event, petitioners' claim is more appropriately addressed to the district court in the form of a collateral motion for relief. The district court can then make whatever inquiry is necessary to comply with the appropriate standards (*e.g.*, *Moore* v. *Illinois*, 408 U.S. 786, 794-795; *United States* v. *Jacquillon*, 496 F.2d 380, 388 (C.A. 5), certiorari denied, 410 U.S. 938) and decide whether petitioners are entitled to relief from their conviction because of a belated determination by the Internal Revenue Service. Petitioners present no reasons to justify a departure from the customary and orderly course of inquiry into collateral matters.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[3]In contrast to petitioners' description of the trial as a "judicial circus" (Pet., par. 21, p. 5), see the district court's remarks following its closing charge, commending "attorneys for both sides on a well tried and well organized case. * * * It has been a pleasure gentlemen to try the case with you" (Tr. 924).